Office-Supreme Court, U.S.
FILED
MAY 15 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1575

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ISABELLE CRAIG, sole heir-at-law and successor in interest to CARL M. WORTH, and SHELL OIL COMPANY, a Delaware corporation,

Appellants,

v.

JOHN E. BICKEL, ETTA MAE BICKEL, GETTY OIL COMPANY, TOTAL LEONARD, INC., THE DOW CHEMICAL COMPANY, SAXON OIL COMPANY, JAMES I. FAIRCHILD, WINIFRED E. FAIRCHILD, and DELORES M. COOK d/b/a SOUTHWESTERN OIL COMPANY,

Appellees.

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

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PRINTED BY SPEAKER-HINES AND THOMAS, INC., LANSING, MICHIGAN—1981

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MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

STATEMENT OF THE CASE

This action to quiet title was filed in a Michigan Circuit Court by John and Etta Mae Bickel and various parties claiming a leasehold estate in oil and gas through the Bickels.[1] Named as defendants were Carl and Doris Worth, both now

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[1] Getty Oil Co., Skelly Oil Co., Total Leonard, Inc., Dow Chemical Co., and Saxon Oil Co.

deceased, and others claiming conflicting rights to the same property.[2]

The facts underlying this case are not in dispute. In 1944, Isabelle Worth deeded to others the surface rights to a parcel of real estate. She, however, reserved the mineral estate pertaining to that parcel. Carl and Doris Worth succeeded to the interests of Isabelle Worth upon her death in 1956. In 1973, they purported to grant an oil and gas lease to Shell Oil Company.[3]

The surface rights sold by Isabelle Worth in 1944 ultimately were conveyed to John and Etta Mae Bickel. In 1974, the Bickels leased oil and gas interests underlying their property to Getty Oil and others.

The premise underlying the Bickels' lease to Getty and their assertion of title to the mineral rights against the Worths is the Michigan Dormant Mineral Act, Michigan Comp. Laws 554.291 ("Act"). That statute, which was passed in 1963 provides that "any interest in oil or gas in any land" shall be taken from the subsurface owner and given to the surface owner unless, within the prior 20 years, (1) it has been sold, leased, mortgaged, or transferred by recorded instrument; (2) a "drilling permit" has been issued for such oil or gas; (3) "actual production" or withdrawal of oil or gas has occurred; (4) the lands in question have been pooled, unitized, or otherwise included in a plan of unit operations; or (5) the area has been used for the underground storage of gas.

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[2]

Shell Oil Co., James and Winifred Fairchild, and Delores Cook d/b/a Southwestern Oil Co.

[3]

The Worths have since died, and their daughter and sole heir-at-law, Isabelle Craig, has succeeded to their interests.

The Act was not limited to prospective operation. Instead, it applied retroactively to properties, such as those owned by the Worths, where the mineral and surface estates were severed prior to its enactment. Owners of such mineral estates, or those claiming through them, were given three years following the enactment of the statute to register their interest in the mineral estate. Thereafter, failing such registration, the Michigan statute automatically vests title in the surface owner. Importantly, the statute in no way impedes the rights of parties who have lost their interests under the Act, from bringing a post-deprivation quiet title action to prove that they had performed one of the acts required to maintain possession of their mineral rights.

In the proceedings below, it was conceded that neither the Worths nor those claiming through them had performed any of the acts enumerated in the Act prior to the enactment of the statute, nor had they fulfilled the registration requirement in the three years that followed. Moreover, none of the parties involved in these earlier proceedings ever asserted that they lacked notice regarding the nature and requirements of the Act.

The only issue presented for decision in these earlier forums was the constitutionality of the statute under both the Michigan Constitution and the United States Constitution. Specifically, the defendants argued in their motion for summary judgment that the Michigan statute deprived them of their property without due process and equal protection of the laws under the Fourteenth Amendment and was an unconstitutional impairment of contract proscribed by Article 1, Section 10, of the United States Constitution.

The trial court granted the Worths' summary judgment motion and struck down the Dormant Mineral Act under the Michigan constitution. The Michigan Court of Appeals affirmed the trial court's judgment. The Michigan Supreme Court reversed.

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Now come the appellees, John E. Bickel, Etta Mae Bickel, Getty Oil Company, Total Leonard, Inc., The Dow Chemical Company, Saxon Oil Company, James I. Fairchild, Winifred E. Fairchild, and Delores M. Cook d/b/a Southwestern Oil Company, and move this court to dismiss or in the alternative to affirm the decision of the Michigan Supreme Court on the ground that there is no substantial federal question.

I.

Appellants initially challenge the Michigan Dormant Mineral Act, Michigan Compiled Laws § 554.291 (1970), as constituting a "Taking of Property" without compensation in violation of the Fifth Amendment as applied to the States through the Fourteenth Amendment. In asserting this view, appellants have improperly interpreted the lengthy and complex history of this Court's decisions with respect to the "Taking" clause.

The various activities engaged in by government form a vast continuum across which this Court has frequently cast inspection. At one extreme, government activities can be fairly described as pure takings. These occur when the State directly invades and appropriates the property of an individual for the public's benefit. The exercise of the eminent domain power to obtain a piece of property for the purpose of building a highway is an example of this type of pure taking. As one moves along this continuum, the rights of individuals to seek redress for government actions diminish, and eventually blend into situations which are justified under the power of the State to regulate in the interests of the public health, safety, welfare and morals. In these cases, although an individual's

property interest is impaired, courts have failed to find the degree of deprivation necessary to constitute a compensable taking. Finally, at the far end of the continuum, beyond those regulatory actions which fall short of a taking, we find government conduct which, although appearing to affect the substantive interests of individuals, has been defined as not affecting substantive rights at all, and thus beyond the scope of Fifth and Fourteenth Amendment protection. It is into this category that the Michigan Dormant Mineral Act falls.

The Michigan Dormant Mineral Act, like many other statutes which have withstood constitutional challenge, does nothing more than impose affirmative duties on individual rightholders; failure to perform such duties jeopardizes those rights. In such cases, courts have viewed this type of legislative enactment as affecting remedies and procedures, and not substantive rights.

A typical example of this occurs in the context of statutes which involve limitations on actions. This Court has held that such statutes affect remedies, not substantive rights; and, therefore, do not disrupt Fifth and Fourteenth Amendment interests. *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, *reh. denied*, 325 U.S. 896 (1945).

The willingness of legislatures to impose affirmative duties on interest holders has been especially prevalent with respect to real property. The impetus for such legislation stems from a long standing policy which favors keeping property in the free flow of commerce. This has prompted a series of enactments which have worked to free property from stale claims and disinterested ownership. For the most part, these legislative initiatives have placed affirmative responsibilities on property holders, who then must comply or run the risk of losing their interests. The courts, with near absolute regularity, have upheld such legislation.

Probably the oldest statutes of this sort are the adverse possession acts. This Court has long taken the position that such laws are constitutional, even though they work to bring about a complete loss of title to property. *See Toltec Ranch Co.* v. *Cook*, 191 U.S. 532 (1903); *Campbell* v. *Holt*, 115 U.S. 620 (1885). Furthermore, in *Soper* v. *Lawrence Brothers Co.*, 201 U.S. 359 (1905), this Court upheld a unique adverse possession law which in many ways paralleled the type of legislation involved in this matter. There, a bill which provided for the obtaining of title to wild land in Maine, property which, like mineral interests, was not readily susceptible to the usual acts of possession consistent with ownership, was ruled constitutional. In reaching that conclusion, the Court noted that the bill provided title holders with the chance to preserve their interests by engaging in certain affirmative conduct (i.e. paying taxes), rather than requiring them to engage in more overt acts of ownership. As with the Michigan Dormant Mineral Act, title holders under the Maine Wild Land Statute could maintain their rights by simply performing the acts enunciated in the legislation.

Courts have accorded similar treatment to another type of statute which places affirmative duties on property owners: recording act legislation. Thus, in *Vance* v. *Vance*, 108 U.S. 514 (1883), this Court upheld the constitutionality of land recording acts in the face of a Fourteenth Amendment challenge. Appellants contend, however, that unlike recording acts, the Michigan Dormant Mineral Act offers title holders no recourse against sellers. In making this argument, though, they fail to realize that the relief potentially available to those who lose their interests via a recording act does not include a return of title, but rather is limited to an action on the contract. Thus, as with the Dormant Mineral Act, recording acts effectuate a complete taking of title.

While adverse possession statutes and the recording acts require land owners to take certain minimal actions to maintain their property interests, this Court has been willing in certain circumstances, to impose even more substantial burdens on right-holders. In *American Land Co.* v. *Zeiss*, 219 U.S. 47 (1911), the Court upheld a California statute that required property owners in rightful possession, to affirmatively appear in court and prove their title to property in order to overcome the recordation problems created by the San Francisco earthquake of 1906. There, the Court said "So, also, it is conclusively established that when the public interests demand, the law may require even a party in actual possession of land and claiming a perfect title to appear before a properly constituted tribunal, and establish that title by judicial proceeding." *Id* at 60.

Probably the legislation most analogous to a Dormant Mineral Act is a marketable title act. As with the Dormant Mineral Act, most marketable title statutes place time limits on the period during which interest holders must act to protect their rights. And, as with the Dormant Mineral Act, marketable title statutes generally operate retrospectively, while, at the same time, offering adverse claimants a grace period during which they may assert their interests. Thus, under the marketable title acts, the rights of interest holders may be cut-off if they fail to take the legislatively-mandated action needed to protect those interests. The same circumstances exist with respect to the Dormant Mineral Act. Not surprisingly, numerous courts have upheld marketable title acts in the face of constitutional challenges. *See Wichelman* v. *Messner*, 250 Minn. 88, 83 N.W.2d 800 (1957); *Lane et al.* v. *Travelers*, 230 Iowa 973, 299 N.W. 553 (1941).

The Michigan Dormant Mineral Act, like many statutes relating to real property, imposes affirmative duties upon interest holders. In this case, the statute requires the owners of severed mineral rights to perform one of a number of specified

acts, the least burdensome of which requires them to publicly file a notice of continued interest, or face termination of their interest. The Act does not, however, constitute any direct deprivation of property. Instead, it establishes procedures which must be followed by interest holders to maintain their property. As such, the Act is not a regulation which affects substantive rights. Consequently, like marketable title acts, recording acts, and adverse possession statutes, it does not offend the dictates of the Fifth and Fourteenth Amendments.

Even if the Michigan Dormant Mineral Act were to be characterized as a measure affecting substantive rights, it does not rise to the level of a compensable taking. As commentators have noted, *see* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 Harv. L. Rev. 1165 (1967); Sax, *Takings and the Police Power*, 74 Yale L. J. 36 (1964), and this Court has stated, " . . . this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, . . . whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124, *reh. denied*, 439 U.S. 883 (1978).

Although the Court has tended to operate in these matters on a case by case basis, the *Penn Central* decision defined the types of considerations which are to be examined when determining whether a governmental action rises to the level of a taking. "In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-

backed expectations are, of course, relevant considerations . . . So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* at 124.

Clearly, the Michigan Dormant Mineral Act does not have the kind of detrimental impact on "distinct investment-backed expectations" identified by the Court in *Penn Central* as necessary to trigger the Constitution's compensation requirements. The interests of owners of subsurface mineral rights are not substantially "interfered with" by the notice requirements imposed by the statute. Nor does the statute provide for the government to "physically invade" the property of the mineral rights holder. Instead, the regulation adjusts the benefits and burdens of economic relationships to promote the common good. For these reasons the Dormant Mineral Act does not constitute a taking as that term is employed by the Fifth and Fourteenth Amendments.

Moreover, in recent decisions affecting real property, courts have tolerated a broad employment of the police power in the interest of providing for the public welfare and general economic good.

In *Goldblatt et al.* v. *Town of Hempstead*, 369 U.S. 590 (1962), this Court upheld a local ordinance which effectively extinguished the mineral interests of the owners of a sand and gravel quarry, by placing severe restraints on the levels at which excavation could be conducted on their property. There the Court said "Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such a characterization does not tell us whether or not the ordinance is unconstitutional. It is an

oft-repeated truism that every regulation necessarily speaks as a prohibition." *Id.* at 592.

Similarily, in *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915), this Court ruled that a zoning restriction which reduced the value of appellants' property from $800,000 to $60,000 was within the reasonable police powers of the state, and not a Fifth Amendment taking.

In a similar fashion, the California Supreme Court upheld the constitutionality of a zoning ordinance like the one in *Goldblatt*, which effectively extinguished plaintiff's mining business. There, although the trier of fact determined that the property involved had no appreciable value other than as an excavation site, the courts upheld the ordinance against a charge that it constituted a taking. *Consolidated Rock Products Co.* v. *City of Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962).

In support of their contention that the Dormant Mineral Act constitutes a "Taking," appellants have relied on this Court's decision in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), where the Court declared unconstitutional a statute which prevented the owners of mineral rights from mining coal if such activities threatened the buildings under which those mining operations were occurring. In reaching its decision, the Court balanced a number of factors including the interests threatened if mining were continued, and the diminution in value of the mineral interests caused by the regulation. The Court eventually decided that the balance of equities was so heavily tilted in favor of the mine owners, that the government interference had to be characterized as a taking.

In this case, however, the interests of the mineral owners are clearly subordinate to the public interests which will be served by the legislation. Here, unlike the appellants in

Mahon, interest holders must have been sleeping on their rights for at least 20 years in order to be affected by the statute. Rather than engaging in the productive use of their property like the appellants in *Mahon*, owners of subsurface interests affected by the Michigan Dormant Mineral Act have kept their properties out of the free flow of commerce for two decades in the face of one of this nation's most serious domestic crises. For them, the balancing considerations detailed in *Mahon* must clearly be said to fall the other way.

An application of this balancing concept is seen in this Court's ruling in *Miller* v. *Schoene*, 276 U.S. 272 (1928). There, the Court upheld a Virginia statute which provided for the destruction of appellant's red cedar trees because of the adverse effects on other forestry in the state caused by the rust produced by the cedars. In considering the relative importance of the various forest products involved, the Court determined that the legislation did not rise to the level of a taking. A similar weighing of interests leads one inevitably to the conclusion that the Michigan Dormant Mineral Act is likewise not a taking.

II.

There is also not a substantial federal question presented by appellants' challenge of this statute as a violation of constitutionally-mandated procedural due process. In fact, appellants' claim that their rights to procedural fairness have been violated, must be deemed insubstantial based on the record itself. Appellants have made no assertion that they lacked notice of the recording requirements of the Dormant Mineral Act, or of the Act's other provisions spelling out actions which, if taken, would prevent them from being deprived of their interests. Moreover, in their stipulations to the trier of fact, to the Michigan courts and to this Court, appellants have acknowledged that they have undertaken none of the various acts

which would preserve their title under the statute. Because of this, it is clear that appellants could not prevail in this quiet title proceeding absent a ruling that the Act is unconstitutional on other grounds, since they would not be successful in this action even if the Act provided for such procedural steps as notice and a pre-deprivation hearing. In short, appellants have not suffered injury as a consequence of the procedures dictated by the Act, and thus have not had their constitutional rights to procedural due process chilled. While other severed mineral interest holders might be able to assert ignorance of the Act, or challenge the facts regarding their conduct with respect to their mineral interests, and as a consequence claim injury as a result of the Act's procedures, this Court has stated, "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Barrows* v. *Jackson*, 346 U.S. 249, 255 (1953).

This Court has, of course, created a narrow set of circumstances under which surrogates may assert the rights of others, but it would not appear that appellants fall within this definition. In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *N.A.A.C.P.* v. *Ala. ex rel. Patterson*, 357 U.S. 449 (1958), this Court identified a series of conditions, the presence of which might permit parties to assert rights as surrogates for absent right holders. Specifically, the Court has identified three such conditions: a substantial relationship between the surrogate and the right holder; the existence of barriers which might prevent the actual right holder from asserting his or her rights; and the possibility for dilution of those rights in the event that they were not resolved in the particular proceeding.

It would not appear that any of these factors exist in the present circumstances, and hence appellants lack standing to raise this procedural due process challenge. There is no substantial relationship between this mineral right holder and other mineral owners who either lacked notice of the legisla-

tion or its impending impact on them, or who might be able to claim that a factual issue exists regarding whether or not they had performed any of the statutorily defined acts which would prevent loss of title. Each is a separate property owner, and no relationship, formal or informal, exists between the appellants and those potential parties. Nor do those with legitimate claims of procedural unfairness have any barriers preventing them from asserting their constitutional challenges. Finally, there is little likelihood that the failure to resolve the procedural due process issue at this time will dilute, or impair the interests of absent right-holders. The Dormant Mineral Act has now been in effect for 18 years. Thus, few additional mineral interest holders are likely to suffer from lack of notice of the Act's salient features. Moreover, since the Act does not preclude disseised parties from challenging that result in a quiet title proceeding, failure to resolve this question will not impair the rights of parties to seek redress for a wrongful deprivation.

Appellants do not claim they suffered any injuries as a consequence of the procedures imposed by the Act, nor do they meet the various criteria established to permit them to advocate the rights of others. And since, in the words of *Singleton* v. *Wulff*, 428 U.S. 106, 114 (1976), one of the major reasons for denying parties the right to raise the constitutional claims of others is the fact that ". . . third parties themselves usually will be the best proponents of their own rights [and since] courts depend on effective advocacy, [they] should prefer to construe legal rights only when the most effective advocates of those rights are before them," appellants lack standing to press this claim.

Even if appellants have standing to assert their procedural due process challenge, such a contention is inappropriately raised in the context of the Michigan Dormant Mineral Act.

This legislative enactment does not constitute a deprivation of property such that an individual's right to process under the Fifth and Fourteenth Amendment is triggered. Rather, the Act merely serves to place responsibilities on the owners of mineral rights, which must be performed in order to preserve their interests. The Act neither takes property, nor directly deprives property owners of their interests.

Legislatures regularly establish procedures which interest holders must follow to protect their rights. The legislative process itself is said, in these circumstances, to constitute due process for those individuals affected by statutes directed at a broad class of citizens. J. Nowak, R. Rotunda & J. Young, *Handbook on Constitutional Law* 500 (1978).

When the legislature enacts a bill which regulates property interests in this fashion, the legislation itself provides sufficient notice of its recording requirements, as the Michigan Supreme Court ruled in *Van Slooten* v. *Larsen, et al.*, 410 Mich. 21, 52 n.28, 299 N.W.2d. 704, 714 n.28 (1980). Clearly, it would invoke a major hardship on government, and significantly impair the State's ability to enact important regulatory legislation, were the legislature required to build a notice mechanism, designed to make all potentially interested parties aware of the enactment, into every statute. Courts have long held that a man is not innocent whose defense is based on ignorance of the law, and this Court has stated that "All persons having property located within a state and subject to its dominion must take note of its statutes affecting the control or disposition of such property and of the procedure which they set up for those purposes." *Anderson National Bank* v. *Luckett*, 321 U.S. 233, 243 (1944). For these reasons, courts have regularly upheld legislative enactments affecting property such as adverse possession laws and the recording acts, without calling for added due process safeguards, even though such bills set in motion a process that can ultimately lead to

disseisin without providing for notice and the opportunity to be heard.

Assuming, arguendo, that the Michigan Dormant Mineral Act were characterized as a substantive deprivation, such that procedural fairness and due process were demanded, the procedures presently available to interest holders satisfy the dictates of the Fifth and Fourteenth Amendments, and thus there is no constitutional requirement for a pre-deprivation hearing. In *Codd* v. *Velger*, 429 U.S. 624 (1977), this Court ruled that where no factual disputes exist, there is no right to any preliminary hearing, even where a substantial deprivation will ensue. As in that case, there are no factual contentions at issue in this proceeding. The parties have each stipulated to a set of facts which would cause appellants to lose title to their mineral rights if this statute is constitutional. Thus, appellants have no right to a pre-deprivation hearing.

But even if there were factual issues in dispute, there is no precise formula with respect to the exact process due in every situation. In *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), this Court held that the constitution only requires " 'an opportunity . . . granted at a meaningful time and in a meaningful manner,' *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965) (emphasis added), 'for [a] hearing appropriate to the nature of the case,' *Mullane* v. *Central Hanover [Bank & Trust Co.*, 339 U.S. 306, 313 (1950)]." *Id.* at 378. That decision went on to say that there is no guarantee that every party get a hearing in every case, and that "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceeding." *Id.* at 378.

This Court's ruling in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), outlined a series of guidelines which the Court has employed to make these determinations concerning procedures

appropriate to a particular deprivation. Integral to this calculation, however, is the notion that the Court will balance the various considerations to determine the proper result. Based on the results of previous balancing efforts, it does not seem that a pre-deprivation hearing right would be found under these circumstances.

The Court in *Mathews* identified four elements which must be examined in determining what process is due: the private interest that will be affected by the deprivation; the risk of an erroneous deprivation; the value of added safeguards; and the government's interest, taking into consideration the government functions involved and the fiscal and administrative burdens entailed by alternative procedures. *Mathews* v. *Eldridge, supra,* 424 U.S. at 335.

Yet another consideration can be derived from the Court's ruling in *Ingraham* v. *Wright,* 430 U.S. 651 (1977). There, the Court suggested that the availability of later redress, either in the form of a post-deprivation hearing or a cause of action against a wrongful party, was to be considered in determining if the right to a pre-deprivation hearing exists.

Taking these factors into consideration, the Michigan Supreme Court in its decision in *Van Slooten* v. *Larsen,* et al., *supra,* 410 Mich. 21, 299 N.W.2d 704 (1980), determined that the procedures established in the Dormant Mineral Act would adequately protect the interests of parties, and stated that "... considering the interests encompassed by this Act, the risks of wrongful deprivation are minimal. The Act does not deprive owners of productive interests of their property without a hearing but only applies to severed interests which have not been worked, as defined in the Act, or recorded for over 20 years. Therefore, since the owner has not been in actual possession of the interest for over 20 years, the risks of financial or other harm from the interim deprivation are minimal . . .

Balancing the minimal protection afforded by requiring a pre-deprivation hearing against countervailing considerations, the legislative determination not to require a pre-deprivation hearing did not deprive defendants of property without due process of law." *Id.* at 54-55, 299 N.W.2d at 715.

An examination of the statute and the circumstances under which it came into effect supports the position adopted by the Michigan Supreme Court. Persons losing title under the provisions of the Michigan Dormant Mineral Act are not foreclosed from having a hearing to determine whether they have been wrongly deprived. Rather, former title holders can always launch a quiet title proceeding against the surface landowner, the individual to whom title is shifted under the Act. Because of this, the risks of an erroneous deprivation are minimized. Moreover, because this Act only affects mineral interests which have not been productively worked for at least 20 years, persons losing title are not apt to suffer serious hardship if they are forced to wait until a post-deprivation hearing to prove that they had complied with the provisions of the Act. Furthermore, at that proceeding, such deprived owners will have the chance to make claims to any pecuniary benefits which have mistakenly accured to the surface owner. For these reasons, the Act's procedures are unlikely to cause any serious injury to wrongfully deprived parties. Consequently, these procedures are likely to emerge unaltered from the type of balancing test outlined in *Mathews*.

The procedures established under the Dormant Mineral Act should also survive a balancing test intact because, from a governmental point of view, they are the only procedures practicable under the circumstances. Dormant Mineral legislation was devised in no small measure because of the strong need to clear titles to subsurface interests which have, by virtue of the failure on the part of right-holders to act with respect to their interests, created confusion with respect to

mineral ownership. Because of this, the questions may fairly be put: (1) Who would initiate a pre-deprivation hearing? and (2) How would such a hearing be undertaken? Ownership of many of these interests is in serious doubt. Time and changing conditions have hopelessly cluttered titles to certain mineral rights, and consequently it is impracticable to expect the government to initiate a formal proceeding every time a 20 year ownership period expires. Moreover, given the lack of clarity as to mineral ownership, placing this burden on the government is both very expensive, and unlikely to provide a substantial safeguard against wrongful and erronerous deprivation. For all these reasons, a balancing of interests argues against a pre-deprivation hearing in these cases.

This position is consistent with the trend of recent decisions regarding pre-deprivation hearing rights. In *Mathews, supra,* the Court held that a pre-deprivation hearing was not required prior to the decision to cut off social security benefits. In *Ingraham, supra,* the Court held similarly that a pre-deprivation hearing was unnecessary in the case of the administration of corporal punishment in the public schools. And, more recently, in *Dixon* v. *Lane,* 431 U.S. 105 (1977), this same verdict was reached in the context of the suspension of a driver's license. *See also Barry* v. *Barchi,* 443 U.S. 55 (1979).

Appellants' reliance on the decision of this Court in *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950), and various cases involving state escheat statutes, *see Standard Oil Co.* v. *New Jersey,* 341 U.S. 428 (1951); *Anderson National Bank* v. *Luckett,* 321 U.S. 233 (1944); and *Security Savings Bank* v. *State of California,* 263 U.S. 282 (1923), as the basis for asserting a right to greater procedural safeguards under the Dormant Mineral Act is mistaken.

Each of these cases involved the Court's determination of the appropriate notice in ". . . any proceeding which is to be

accorded finality . . ." *Mullane* v. *Central Hanover Bank & Trust Co., supra,* 339 U.S. at 314. The passage of title to mineral interests under the Michigan Dormant Mineral Act is not a "proceeding which is to be accorded finality." Deprived mineral owners still have available to them a quiet title action to regain their wrongfully taken interests. Moreover, surface owners seeking to gain judicial ratification of the legitimacy of their title to the mineral interests gained as a consequence of the Dormant Mineral Act, are required to give proper notice to deprived former right holders.

Furthermore, appellants' reliance on these cases to form the basis for its due process claim is also incorrect because, in effect, it turns due process doctrine on its head. What appellants have done is to take the requirement that notice be given identifiable parties in the context of a "proceeding to be accorded finality," devised in *Mullane,* and used it to find a general right of notice for any traceable party affected by any piece of legislation. Then, having allegedly found a notice right, they have attempted to also employ a bootstrap argument to find a hearing right. This is an incorrect analysis of the constitutional law as it pertains to procedural due process. As the Michigan Supreme Court stated, "because the due process guarantees do not require a hearing prior to vesting title in the owner of the surface estate, we do not accept defendant's claim that the absence of any provision in the statute for notice of such a hearing renders it constitutionally infirm. The constitutional right to notice of a hearing is implicit in and dependent upon a right to an opportunity for a hearing. No such hearing is provided for or required by the statute; therefore it is not unconstitutional on the basis that it does not have adequate provisions for notice of such a hearing." *Van Slooten* v. *Larsen, et al., supra,* 410 Mich. at 55, 299 N.W.2d at 716.

III.

The Michigan Dormant Mineral Act, like its counterparts in other jurisdictions, serves many valuable public policy objectives. The numerous legislative enactments affecting property, found in the adverse possession laws, the recording statutes and marketable title acts, have all been developed for the purpose of making land marketable and keeping property within the flow of commerce. The economic goals of our society are largely dependent on the free movement of resources and the flow of productive resources into the hands of those who will maximize their usefulness. Title owners who sleep on their rights and prevent assets from being used in their most productive manner are a prime barrier to economic growth. The various legislatively created land and title clearing acts were designed to cut off these slumbering title holders and return productive assets to the channels of commerce.

Nowhere is the need greater for this type of legislation than in the area of mineral rights. This Court need not be lectured on the energy problems faced by the United States: legislation which serves to increase the production of energy is vital to our national well-being. Thus, the objectives of the Dormant Mineral Act constitute a crucial and legitimate use of the police power.

Absent legislation such as this, energy producers, fearful that their high risk investments will be undermined by the later intervention of adverse interest holders, are not likely to make the major kinds of financial investments required to explore for subsurface minerals. The costs of drilling a dry well are enormous and the risks substantial enough, without the added threat of encountering conflicting title problems. At a certain stage, the risks exceed the potential benefits of exploration, and when they do, investors lack the incentive

needed to take the actions required to develop new energy sources. The Michigan Dormant Mineral Act serves the valuable public policy purpose of lowering these steep odds to an acceptable level.

CONCLUSION

The Michigan Dormant Mineral Act is merely an extension to the area of severed oil and gas interests of the same legal principles which have sustained the constitutionality of the recording acts, adverse possession statutes and marketable title acts. Moreover, it is consistent with a line of cases, decided by this Court, wherein government actions have been held not to constitute a constitutional "Taking."

Because the Act does not directly deprive individuals of their property, it likewise does not deprive them of their right to procedural due process. But even if it had such an impact, the procedural safeguards provided by the Act, are adequate to protect the constitutional rights of individuals affected by the legislation.

For these reasons, and because the Act in question here serves a valid and valuable public purpose the appeal should be dismissed or, in the alternative, the decision of the Michigan Supreme Court in *Van Slooten* v. *Larsen, et al.* should be affirmed.

Respectfully submitted

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